Supreme Court, U.S.
FILED
JUN 23 1997
OFFICE OF THE CLERK

No. 96-1853

In The

Supreme Court of the United States

October Term, 1996

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL, DEWEY BULL TAIL, AND RON ARNESON, CROW TRIBAL COURT SPECIAL JUDGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth District

BRIEF IN OPPOSITION FOR RESPONDENT RON ARNESON

JOEL E. GUTHALS
Counsel of Record
VIRGINIA A. BRYAN
WRIGHT, TOLLIVER
AND GUTHALS, P.C.
Attorneys for Respondent Ron Arneson
10 North 27th Street
P. O. Box 1977
Billings, Montana 59103-1977
(406) 245-3071

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

QUESTION PRESENTED

The question raised by this Petition for Writ of Certiorari is whether this Court needs to reiterate the "exhaustion rule" as it applies to tribal courts. The rule was first announced by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-857 (1985); stated again in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987); and most recently explained and reaffirmed in *Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404 (1997). The United States Court of Appeals for the Ninth Circuit correctly applied the exhaustion rule in this case. Specifically, the Ninth Circuit dissolved a United States District Court injunction on the grounds that it interfered with the Crow Tribal Court's authority to set proper conditions for supersedeas bond on a Crow Tribal Court judgment.

LIST OF INTERESTED PARTIES

The Petitioner is Burlington Northern Railroad Company, hereafter referred to as "**BN**".

The Respondents are:

The Estates of Red Wolf and Bull Tail, Valerie Red Wolf, Gladys Red Wolf, Randy Red Wolf, Dorrie Bull Tail, and Dewey Bull Tail, hereinafter referred to as the "**Estates of Red Wolf and Bull Tail**"; and

Ron Arneson, Crow Tribal Court Special Judge, hereinafter referred to as "**Judge Arneson**".

The Estates of Red Wolf and Bull Tail have representation separate from Judge Arneson.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
A. Introduction	1
B. Events Leading to Litigation	1
C. Proceedings in Tribal Courts and United States District Court	2
D. Proceedings in Ninth Circuit Court of Appeals	4
Reasons for Denying the Writ	4
I. No Special Or Important Reasons For Certiorari.	4
II. Ninth Circuit Correctly Applied Exhaustion Rule.	5

Contents

Page

III. Circumvention Of Exhaustion Rule To Decide Jurisdiction Is Inappropriate. 9

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Bingler v. Johnson, 394 U.S. 741 (1969) 4

Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412 (8th Cir. 1996) 8

Crawford v. Genuine Parts Co., Inc., 947 F.2d 1405 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992) 7

Donaldson v. United States, 400 U.S. 517 (1971) ... 4

Duncan Energy Corp. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103 (1995) 8

Egan v. City of Aurora, 365 U.S. 514 (1961) 4

FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) 6

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) .....i, 4, 5, 6, 7, 9, 11

Contents

Page

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 4

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) ..... i, 4, 5, 6, 7, 8, 9, 10, 11

Reservation Tel. Coop. v. Three Affiliated Tribes, 76 F.3d 181 (8th Cir. 1996) 8

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 4

Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) 6

Strate v. A-1 Contractors, __ U.S. __, 117 S. Ct. 1404 (1997) .....i, 5, 6, 7, 9, 10, 11

United States v. Soldana, 246 U.S. 530 (1918) 10

Statutes Cited:

28 U.S.C. § 1254(1) 1

Congressional Act, 25 Stat. 660 10

Rule Cited:

Supreme Court Rule 17 ..... 4, 11

Contents

Page

APPENDIX

Appendix A — Procecural Order of the Crow Court of Appeals for the Crow Indian Reservation, Crow Agency, Montana Dated June 17, 1997 ..... 1a

Appendix B — Opinion and Order of the Crow Court of Appeals for the Crow Indian Reservation, Crow Agency, Montana Dated June 17, 1997 ..... 6a

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, from which BN seeks a writ of certiorari, is reported at 106 F.3d 868. (Pet. App. 1a-15a). The Opinion of the United States District Court is unreported, but is attached to BN's Petition as Pet. App. 16a-23a. Recent decisions of the Crow Court of Appeals on reduction of the travel court judgment and setting supersedeas bond conditions are attached to this brief as Resp. Arneson App. 1a-5a & 6a-13a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the final decisions of the United States Court of Appeals for the Ninth Circuit upon Petition for Writ of Certiorari in accordance with 28 U.S.C. § 1254(1). Judge Arneson concurs with BN that the Ninth Circuit issued a final decision and that BN's Petition to this Court was timely filed. Therefore, this Court has jurisdiction to consider the Petition and to review the opinion of the Ninth Circuit should certiorari be granted.

It is Judge Arneson's position that the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. Introduction

This case questions the propriety of the United States District Court's intervention in on-going litigation in the Crow Tribal Courts. The District Court entered an injunction staying enforcement of the tribal judgment, including any action requiring the posting of supersedeas bond by the BN.

B. Events Leading to Litigation

This case arises out of a collision between a BN freight train and a private automobile operated and occupied by enrolled

members of the Crow Tribe. The collision occurred on the Crow Tribal Reservation at the intersection of a highway thereon and a BN right of way. Two members of the Crow Tribe of Indians were killed in the collision. Their estates and heirs filed suit in Crow Tribal Court on February 8, 1994.

C. Proceedings in Tribal Courts and United States District Court

Judge Arneson, Special Judge of the Crow Tribal Court, assumed jurisdiction over the case. During pretrial proceedings, BN challenged the tribal court's jurisdiction by filing suit in the United States District Court. On November 3, 1994, the District Court ruled that the Crow Tribal Court should exercise jurisdiction over the case, and that intervention by the District Court was inappropriate under the exhaustion rule.

Judge Arneson presided over extensive pretrial and trial proceedings which resulted in a jury verdict of liability and compensatory damages totaling $250 million. The Estates of Red Wolf and Bull Tail filed a motion to reduce the judgment to $25 million. The Crow Court of Appeals has issued an order dated June 17, 1997 ordering the Crow Tribal Court to reduce the judgment to $25 million, without prejudice to BN's right to seek full review of the amended judgment. (Resp. Arneson App. 1a-5a).

In response to the jury verdict, BN filed post-trial motions with the Crow Tribal Court, a motion with the Crow Court of Appeals, an interlocutory Notice of Appeal to the Crow Court of Appeals before judgment was entered, and a Notice of Appeal after judgment was entered. For the second time, BN filed suit in United States District Court, wherein it sought to enjoin enforcement of the judgment, and restrain action by the Crow Tribal Court on the question of supersedeas bond or security for the judgment.

BN's second suit named Judge Arneson as a Defendant. Judge Arneson appeared, through counsel, in the District Court and in the Ninth Circuit to assert the Crow Tribal Court's authority in this matter and to prevent interference by the District Court while the litigation was pending before the Crow Tribal Court.[1]

Judge Arneson attempted to hold a hearing on the question of BN's supersedeas bond. This was a futile effort because, by the time of that hearing, the District Court had issued its Temporary Restraining Order. Subsequently, BN refused to discuss any aspects of a supersedeas bond. Judge Arneson had no alternative but to issue an order requiring a full supersedeas bond. (Pet. App. 24a-28a). The Crow Court of Appeals issued an order giving guidance to Judge Arneson on handling the supersedeas bond. (Pet. App. 29a-42a). Judge Arneson was unable to fully comply with this order because by that point, a Preliminary Injunction had been entered. (Pet. App. 16a-23a). As a result, BN refused to post any bond in the Crow Tribal Court. The United States District Court's Preliminary Injunction allowed BN to post a $5 million injunction bond in lieu of supersedeas bond required by the Crow Tribal Court. The Crow Court of Appeals ruled on June 17, 1997 that BN shall post bond of $30 million to obtain stay of execution of the amended judgment provided that there shall be no execution until BN receives Federal Court review of the judgment. (Resp. Arneson App. 6a-13a). There has been no final determination of the judgment against BN, as the matter remains on appeal before the Crow Court of Appeals.

---

1. Judge Arneson takes no position herein on the contentions of either BN or the Estates of Red Wolf and Bull Tail regarding the propriety of the trial proceedings, jurisdiction of the Tribal Court, and other issues which are presently pending before the Crow Court of Appeals or the Crow Tribal Court in pending post-trial motions. Those matters shall be decided by the appropriate Tribal Court.

D. Proceedings in Ninth Circuit Court of Appeals

The Ninth Circuit reversed the District Court. It ruled that the District Court erred in enjoining the Crow Tribal Court proceedings before tribal court remedies had been exhausted. The Ninth Court held that the case was governed by the exhaustion rule announced by this Court in *National Farmers* and *Iowa Mutual*. The Ninth Circuit held that BN presented no exception to the exhaustion rule.

REASONS FOR DENYING THE WRIT

I.

NO SPECIAL OR IMPORTANT REASONS FOR CERTIORARI.

Review on writ of certiorari is to be granted only when there are special and important reasons. Supreme Court Rule 17. Such special and important reasons have been identified by this Court as including issues of constitutional dimension, conflict between the courts of appeal, conflicts between the courts of appeal and the Supreme Court, important questions relating to the administration and enforcement of federal law, cases of important public interest, and cases presenting novel federal questions. *See, e.g., Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Bingler v. Johnson*, 394 U.S. 741 (1969); *Egan v. City of Aurora*, 365 U.S. 514 (1961); *Donaldson v. United States*, 400 U.S. 517 (1971); and *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

In this case, there is no constitutional issue presented. The ruling of the Ninth Circuit applying the exhaustion rule does not conflict with the decisions of other circuit courts, nor does it conflict with any decision of this Court. Rather, it explicitly

follows the decisions of this Court in *National Farmers*, *Iowa Mutual*, and *A-1 Contractors*. The case does not involve any question of the administration or enforcement of federal statutes. It is not of any great public interest. The case does not present any novel questions.

The case is of interest only because of the size of the original judgment. However, that is a matter of interest only to the parties. Moreover, the amount of the judgment has been reduced, is under review within the Crow Tribal Court system, and it is not final at this point.

Accordingly, the case presents none of the special reasons required for granting writ of certiorari.

II.

NINTH CIRCUIT CORRECTLY APPLIED EXHAUSTION RULE.

In *National Farmers*, 471 U.S. at 855-857 and *Iowa Mutual*, 480 U.S. at 15-19, this Court established the exhaustion rule. Under this rule, federal courts are to refrain from interfering with tribal court proceedings, including questions of tribal jurisdiction, until such proceedings have been fully litigated and decided by tribal courts:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover, the orderly

> administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of Tribal Court remedies, moreover, will encourage Tribal Courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers, 471 U.S. at 856-857 (footnotes omitted).[2]

Strate v. A-1 Contractors, 117 S. Ct. 1404, decided by this Court only two months ago, reaffirmed the validity and importance of the exhaustion rule when no cause can be shown for immediate federal court intervention. *See id.*, 117 S. Ct. at 1411. This Court, in commenting upon its previous analysis in *National Farmers*, recognized the need to defer to a tribal court's capacity to review and explain the basis for tribal court jurisdiction. This Court emphasized that the exhaustion rule,

---

2. After tribal remedies have been exhausted, the federal courts can review the federal law issues of tribal jurisdiction decided by the tribal courts. *National Farmers*, 471 U.S. at 856-857; *Iowa Mutual*, 480 U.S. at 15-19; *see also FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991); *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

enunciated in *National Farmers* and *Iowa Mutual*, was not altered by its decision in *A-1 Contractors*. *See id.*, 117 S. Ct. at 1413. The Ninth Circuit's decision in the present case correctly and carefully applies the exhaustion rule established in *National Farmers* and *Iowa Mutual* and recently restated in *A-1 Contractors*.

The Ninth Circuit began its analysis with a restatement of the holdings of *National Farmers* and *Iowa Mutual*, which mandate that federal courts defer to tribal courts as a matter of comity. This deference extends to the tribal appellate process, as well as the trial courts of the tribal court system. *National Farmers*, 471 U.S. at 857; *Iowa Mutual*, 480 U.S. at 17. The Ninth Circuit acknowledged that under certain circumstances it is appropriate for the District Court to intercede in a tribal court matters, but those exceptions are limited. Those exceptions, set forth in *National Farmers* and cited by the Ninth Circuit, are three-fold: (1) is the assertion of tribal court jurisdiction motivated by a desire to harass or conducted in bad faith? (2) is the action one which patently violates express jurisdictional prohibitions? or (3) is exhaustion futile because of a lack of adequate opportunity to challenge the tribal court jurisdiction? (Pet. App. 7a-8a). These three exceptions were recently underscored in *A-1 Contractors*.

The Ninth Circuit held that BN was required, but failed, to show that any of the three established exceptions applied, citing *National Farmers* and *Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405, 1408 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992). The party asserting an exception to the exhaustion rule has the burden of alleging and proving the exception. In this case, no proof appears in the record that an exception applies. Therefore, the Ninth Circuit appropriately held that the District Court's intervention was premature.

BN tried to justify the District Court's intervention on grounds that BN could not risk posting a bond or other security in tribal court, as such action might lead to an enforcement of the judgment on the reservation, thereby making alleged due process violations at trial ineligible for federal review. The Ninth Circuit rejected BN's characterization of this argument as coming within the "futility" exception, noting that BN was assured of federal review of tribal court jurisdiction. The Ninth Circuit's construction of the "futility" exception is consistent with related holdings of the Eighth Circuit. *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996); *Reservation Tel. Coop. v. Three Affiliated Tribes*, 76 F.3d 181, 185-186 (8th Cir. 1996) and *Duncan Energy Corp. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300-1301 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103 (1995). Appropriately, the Ninth Circuit directed the District Court to "stay its hand" pending the exhaustion of Crow Tribal Court proceedings or alternatively, to dismiss BN's action without prejudice. (Pet. App. 9a).

This case is an excellent example of the need for adherence to the exhaustion rule. Before the trial court had an opportunity to rule on the supersedeas bond question and consider post-trial motions, and before the Crow Court of Appeals had reviewed those issues, the parties and the tribal judge became embroiled in federal court litigation and were subjected to a temporary restraining order and preliminary injunction, followed by an appeal to the Ninth Circuit. The plethora of motions and briefs, and the multiple forum litigation has created a "procedural nightmare"[3] The role and authority of the Crow Tribal Court has been severely undermined. The Ninth Circuit's decision dissolving the injunction ended the nightmare and restored procedural correctness to the litigation.

---

3. *See National Farmers*, 471 U.S. at 856-857.

The exhaustion rule is derived, in part, from congressional policy to support and respect tribal self-government and its legal institutions. *Iowa Mutual*, 480 U.S. at 16-17. It gives the tribal court full opportunity to determine those instances in which its exercise of jurisdiction may or may not be appropriate, and to evaluate the factual and legal bases for the challenge. *National Farmers*, 471 U.S. at 856. The District Court's intervention in this case clearly violated these underlying policies. The Ninth Circuit was correct in ending that intervention.

III.

CIRCUMVENTION OF EXHAUSTION RULE TO DECIDE JURISDICTION IS INAPPROPRIATE.

BN argues that either this Court, on certiorari, or the United States District Court, on remand, should determine that the Crow Tribal Court's exercise of jurisdiction over the case is incorrect under the teachings of *A-1 Contractors*. BN asserts that because this case is so clearly similar to *A-1 Contractors*, exhaustion is not required, and it would be a waste of time and resources to have the jurisdictional issue decided by the Crow Tribal Court. This argument is directly contrary to this Court's pronouncements in *Iowa Mutual*, 480 U.S. at 17:

> At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.

Further, while Judge Arneson does not take a position on the merits of BN's latest jurisdictional assertion, *A-1 Contractors* appears to involve facts and procedural background which are very different from those in the litigation initiated by the Estates of Red Wolf and Bull Tail. On-going tribal court proceedings in

A-1 Contractors were not involuntarily halted by the District Court's actions, as they were in the present case. Mrs. Fredericks, the injured plaintiff in *A-1 Contractors*, was not a tribal member, whereas two tribal members were killed in the accident leading to the Estates of Red Wolf and Bull Tail litigation. In *A-1 Contractors*, the automobile accident occurred on a North Dakota state highway which traversed the reservation, while the decedents in the present case were killed at an intersection of a BN railroad crossing and road maintained by the Crow Tribe.

BN's arguments in its Petition for Writ of Certiorari do not mention or analyze the impact of *United States v. Soldana*, 246 U.S. 530, 532-533 (1918). In that case, this Court held that the Crow Tribe retains title to the land beneath the railroad right-of-way crossing the Reservation. Unlike the situation in *A-1 Contractors*, it appears that the Crow Tribe did not abdicate its right to control the land underlying the BN's railroad crossing, nor was the Crow Tribe's title to the underlying land extinguished by the railroad right of way.

BN's jurisdictional arguments do not analyze the effect and import of the language contained in the Congressional Act, 25 Stat. 660, which created the right of way and required the railroad to conduct operations "with due regard to the rights of the Indians." (Pet. App. 44a). There was no such duty in the right of way language at issue in *A-1 Contractors*.

All of these differences must be considered and reviewed by the Crow Tribal Courts prior to review by the federal courts under the exhaustion rule.

BN has challenged the tribal court's jurisdiction in its appeal to the Crow Court of Appeals. The Crow Tribal Courts are fully capable of carefully examining and properly resolving BN's jurisdictional challenges. According to *National Farmers*,

". . . an orderly administration of justice in the federal courts will be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed." 471 U.S. at 856. The Crow Tribal Courts will have the full benefit of this Court's decision in *A-1 Contractors* when it responds to BN's objections to the tribal court's acceptance of jurisdiction over this case. Until that process is completed, the exhaustion rule requires that the federal courts not interfere.

CONCLUSION

No special or important question has been presented by BN which merits granting BN's Petition for Writ of Certiorari under Supreme Court Rule 17. The Ninth Circuit correctly applied established precedent of this Court in analyzing whether the District Court properly intervened in pending litigation before the Crow Tribal Court. The Ninth Circuit correctly determined that the United States District Court should "stay its hand" until Crow Tribal Court remedies were exhausted, under the principals enunciated by this Court in *National Farmers*, *Iowa Mutual* and, most recently, *A-1 Contractors*. The Ninth Circuit correctly determined that none of the three established exceptions to the exhaustion rule applied. Accordingly, it did not err when invalidating the District Court's actions during the pendency of the Crow Tribal Court proceedings.

BN is wrong when it suggests that under *A-1 Contractors*, the jurisdictional question presented in this case should be decided in the federal courts, without deference to the process pending before the Crow Tribal Court. The facts and procedural background of *A-1 Contractors* are clearly distinguishable from the present case. Further, a decision on the jurisdiction question, before a complete review and analysis by the tribal courts, is in direct contravention of this Court's holdings in *Iowa Mutual* and *National Farmers*.

This case was correctly decided by the Ninth Circuit. There is no basis for BN's Petition for Writ of Certiorari. The Petition should be denied in order to allow this case to be properly resolved and disposed of in the first instance by the Crow Tribal Courts, and then reviewed, as may be appropriate, by the federal courts.

Respectfully submitted,

JOEL E. GUTHALS
Counsel of Record
VIRGINIA A. BRYAN
WRIGHT, TOLLIVER
AND GUTHALS, P.C.
Attorneys for Respondent
Ron Arneson
10 North 27th Street
P. O. Box 1977
Billings, Montana 59103-1977
(406) 245-3071

Dated: June 23, 1997

APPENDIX A — PROCEDURAL ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA DATED JUNE 17, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

LIMITED REMAND ORDER AND REVISED ORDER GOVERNING CONDUCT OF APPEAL

The parties having filed briefs regarding the procedural questions raised in the Court's Order Governing Conduct of Appeal dated February 6, 1997, the Court issues this revised order which, for convenient reference, replaces the previous order in its entirety. A separate order is being issued concurrently regarding the stay of the amended judgment and the supersedeas bond. Now, therefore,

IT IS HEREBY ORDERED that:

1. This case is REMANDED to the Tribal Court for the

limited purpose of entering an amended judgment *nunc pro tunc* (i.e., retroactive to the date the original judgment was entered) in the amount of $5 million per heir, or $25 million total, plus post-judgment interest at ten percent (10%) per annum from February 6, 1996. The Tribal Court's inquiry on remand shall be limited to the sufficiency of the plaintiffs' affidavits consenting to the reduced judgment, which were filed with the Tribal Court during March, 1997, or such other evidence of the plaintiffs' knowing consent that the Tribal Court deems necessary. The judgment shall recite that it is without prejudice to the defendant's right to seek full review of the amended judgment.

IT IS FURTHER ORDERED that:

2. The parties in their appellate briefs shall address any issues they deem pertinent with respect to the Tribal Court's jurisdiction in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404 (1997).[1] The parties may supplement the record with copies of such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances, and right-of-way documents. These materials shall be set forth in a separate appendix annexed to the briefs.

---

1. Based on our initial reading, Tribal Court jurisdiction in this case is not controlled by the Court's recent decision in *Strate v. A-1 Contractors*. The defendant's ownership and use of its right-of-way differs fundamentally from a motorist's use of a state highway, and has different implications for the exceptions to the Montana test, if that test applies here at all. Moreover, because of the nature of these differences and appellant's long-term and continuing presence on the Reservation, the Tribal Court's assertion of jurisdiction in this case does not require the railroad to defend in an "unfamiliar court." *Id.*, 117 S. Ct. at 1416. We therefore do not regard this case as one where it is evident that the Tribal Court lacks jurisdiction and the Federal court exhaustion requirement does not apply. *Id.* at 1416 n. 14.

Appendix A

IT IS FURTHER ORDERED that:

3. The official caption of this appeal and the docket number shall remain as they appear in the caption of this order for all appellate proceedings subsequent to the entry of the amended judgment. The Appellant's notice of appeal shall be deemed to be timely filed, without the necessity of filing another notice of appeal.

4. The schedules for transmitting the record and filing briefs under Rules 8 and 10 of the Crow Rules of Appellate Procedure are VACATED, and those schedules shall be governed by order of the court, including this order.

5. The record on appeal shall be transmitted promptly *after* the Tribal Court enters the amended judgment. One complete copy of the record, together with the original exhibits, shall be transmitted to the Court of Appeals pursuant to Crow R. App. P. 8(b). Except as listed in below, the record on appeal shall consist of the items listed in Crow R. App. P. 7(a), and the transcripts of the Tribal Court proceedings shall be in written form only.

(a) A copy of the videotape of Hon. Donald Stewart's address to the venire (*see Burlington Northern Railroad Company v. Red Wolf*, 106 F.3d 868, 872 (9th Cir., 1997) (Kleinfeld, J., dissenting), shall be included in the record. No other videotapes shall be included in the record on appeal.

(b) A transcription of the audiotapes of proceedings prior to December 12, 1994 (*see* BN's procedural brief at 11), shall be included in the record, or a statement thereof

as provided in Crow R. App. P. 7(b). The appellant shall be responsible for preparing the transcription or statement.

(c) Transcripts of any proceedings or statements in the Crow language shall include translations into English certified by the translator, and the record shall include any such translations submitted prior to the date of transmission.

(d) The costs of transcripts, a certified translation, and of duplicating one complete copy of the record pursuant to Crow R. App. P. 8(a) and (b) shall be paid or reimbursed by Appellant upon its receipt of the Clerk of the Tribal Court's statement(s).

(e) The Clerk of the Court of Appeals shall serve a Notice of Transmission of the Record on the parties' counsel.

6. The form and filing times for the parties' appellate briefs shall be as follows:

(a) Appellant's principal brief on appeal shall be filed within thirty (30) calendar days following the date of the notice of transmission of the record;

(b) Appellees' response brief shall be filed within twenty-five (25) days after receipt of appellant's brief;

(c) Appellant shall be permitted to file a reply brief within ten (10) days after receipt of appellees' brief;

(d) The form of the parties' briefs should conform generally to Ninth Circuit Rules 28-1 and 28-2 as

applicable, except that the maximum length shall be seventy (70) pages for the parties' principal briefs and twenty-five (25) pages for the reply, and references to the record shall be made to page numbers of the Excerpts of the Record; and

(e) The parties shall file with their briefs paginated "Excerpts of the Record" in conformance with Ninth Circuit Rule 30-1, except that the number of copies filed shall be the same as the number of briefs specified in Crow R. App. P. 9(a).

7. The Court will schedule oral argument by further order.

8. All motions for extension of time must be supported by a sworn affidavit and state opposing counsel's position regarding the extension.

DATED this 17th day of June, 1997.

s/ Victoria White
Victoria White, Chief Judge
Crow Court of Appeals

s/ Glen Birdinground
Glen Birdinground, Judge
Crow Court of Appeals

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals

APPENDIX B — OPINION AND ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA DATED JUNE 17, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

OPINION AND ORDER ON SURETY BOND

Defendant-Appellant Burlington Northern Railroad Company[1] has moved the court for a stay of execution on the judgment in this case, without a requirement that it post bond or any other form of security. According to the railroad, the motion is conditional, because it need not be addressed until the U.S. District Court's injunction barring enforcement of the judgment is vacated. *See Burlington Northern Railroad Co. v. Estate of Red Wolf, et al.*, 106 F.3d 868 (9th Cir. 1997), *petition for cert. filed* (U.S. May 16, 1997) (No. 96-1853).

---

1. As a result of a merger effective December 31, 1996, the defendant corporation's name is now Burlington Northern and Santa Fe Railway Company. Crosby Aff. ¶ 2.

Appendix B

In light of the Ninth Circuit's decision cited above, Plaintiffs-appellees object to any further stay of execution on the judgment without the railroad being required to post a surety bond. However, it is these judgment creditors' position that while a bond in the full amount of the judgment, plus interest, must be posted immediately, they do not object to barring any execution on the bond until the railroad exhausts its federal review rights. We agree with the plaintiffs-appellees' position as being reasonable and compelled by Tribal law.

The judgment appealed from in this case was originally entered on February 6, 1996, in the aggregate amount of $250 million. The railroad requested the Tribal Court to waive the requirement in Rule 18(b) of the Crow Rules of Civil Procedure for posting a surety bond as a condition of a stay pending appeal. The Tribal Court denied the stay on February 9, 1996, and scheduled a hearing for approval of the surety bond.

The railroad immediately appealed the denial of the stay to this court, and without waiting for this court's decision or the Tribal Court' hearing, it obtained a restraining order and later a preliminary injunction from the U.S. District Court against the plaintiffs and the Honorable Tribal Court Judge. *Burlington Northern Railroad Company v. Estate of Red Wolf*, Cause No. CV 96-17-BLG-JDS (TRO dated Feb. 15, 1996). A divided panel of the U.S. Court of Appeals for the Ninth Circuit reversed and remanded on January 29, 1997, directing that the injunction be dissolved and the Federal court case stayed or dismissed pending the railroad's exhaustion of its remedies in the Tribal courts. *Red Wolf, supra*, 106 F.3d at 871. After the usual post-decisional motions were denied, the railroad filed a petition for writ of certiorari on May 16, 1997, which remains pending.

Appendix B

Meanwhile, twelve days after the Tribal Court denied the stay, a single judge of this court issued an expedited opinion and order denying the appeal as premature, but providing guidance to the Tribal Court on the requirements for the bond or other form of security under Crow R. Civ. P. 18(b). *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co.*, Civ. App. Docket No. 94-31 (Feb. 21, 1996). In that opinion, which the full panel adopts, the court held that (1) the requirement for fully securing the judgment is a mandatory requirement for the stay under the Tribal code, and (2) a substantial portion of the judgment must be secured by a surety bond, but (3) considering the magnitude of the judgment, some combination of other forms of security for the remainder would be within the Tribal Court's discretion. However, in further Tribal court proceedings relating to the bond, the railroad refused to post a bond of any kind, or to propose any other alternative forms of security.

This court again assumed jurisdiction of this case after the Tribal Court denied the railroad's post-trial motions on December 30, 1996. On January 28, 1997, the plaintiffs filed a "Notice and Request" for voluntary reducing the judgment to a total of $25 million, or $5 million per heir. In that Notice, the plaintiffs also requested that the railroad be required to post a $30 million bond to guarantee payment of the amended judgment plus interest, and with the "additional condition that any payment thereon shall not be required until the [railroad] receives whatever federal review it properly seeks and is entitled to." Notice and Request at 4.

This court on February 6, 1997, issued an Order Governing Conduct of Appeal which, among other things, indicated the court's intention to remand to the Tribal Court for the limited

purpose of amending the judgment to the reduced amount, and requested the parties to brief certain procedural issues. The parties did not object to the limited remand for amending the judgment, and a separate remand order is being issued concurrently with this opinion and order. All further references to the judgment in this opinion are to the amended judgment which we have directed the Tribal Court to enter.

This court's February 6 order also assumed jurisdiction over the surety bond issue. The order stayed further proceedings to enforce the judgment until the railroad exhausted or waived its rights to Federal court review of the requirement to post bond with the Tribal Court. We reconsider that order, along with the railroad's request for a further stay without the requirement to post bond, in light of the parties' procedural briefs.

There is a certain facial attractiveness to the prudential concept of staying Tribal court enforcement proceedings until the judgment debtor has exhausted its Federal court remedies without posting a bond. It may be argued on grounds of comity and sound judicial administration that it doesn't make sense to require a bond to be posted while there is any chance that the Supreme Court will grant the certiorari petition and reinstate the district court's injunction.[2] However, deferring to the Federal courts in these circumstances only leads us in a circle, because they, in turn, have been directed to stay their hands as a matter of comity until Tribal court remedies are exhausted. Thus, in light of the Ninth Circuit's clear directive to dissolve the Federal court injunction, we must vacate paragraph 2 of this court's February 6th order, and turn to the railroad's arguments in support of a continuing stay without bond.

---

2. We consider this possibility without presuming that this case, in its current procedural posture, merits the attention of Supreme Court of the United States.

Appendix B

We start with the express requirement of Tribal law, as discussed and upheld in this court's opinion of February 21, 1996, that posting security for the full amount of the judgment is mandatory under the language of Crow R. Civ. P. 18(b). We examine the railroad's arguments to determine if some overriding emergency or inequity would result from requiring the railroad to post a $30 million bond.

First, the railroad points out that there can be no question of its ability to satisfy the reduced judgment. In lieu of any security, the railroad offers to provide quarterly SEC filings periodically to the parties and the court. BN Brief at 5. Although its assets on the Reservation are not sufficient to satisfy the judgment, the railroad is not the type of entity that can conceal its extensive physical assets located throughout the United States. *Id.* This is consistent with the railroad's openly avowed strategy of forcing the plaintiffs to execute against off-reservation assets (which would not be necessary once a bond were posted with the Tribal Court). BN Brief at 8.

The railroad thus frames the question as whether it must sacrifice its assets by posting bond in order to preserve its review rights beyond this court. *Id.* It is apparent that the import of the railroad's request is to allow it to use special proceedings to enforce the equivalent of a foreign-country judgment as a device for obtaining review of Tribal Court due process in various *state* courts in other jurisdictions where the railroad's off-reservation assets are located. *See* BN Brief at 8-9 and notes 7 and 8.

We cannot create an exception to express statutory law in order to accommodate this strategy of attrition. We are confident that whatever extra-Tribal remedies the railroad may have after

this court completes its review will be appropriately protected by the Federal courts. *See, e.g., Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997). Conditioned as proposed by the plaintiffs, the bond would accommodate whatever federal review rights are determined to exist so that the railroad's property will be fully protected until it has had the opportunity to seek review of the judgment by the highest court in the land. That seems fair enough to us.

Next, the railroad argues that it is unjust to require it to post bond considering the excessive size of the judgment together with the serious questions it will raise regarding the conduct of the trial, and the plaintiffs' apparent inability to reimburse the cost if the railroad prevails on appeal. We have thrice previously declined to review the Tribal Court proceedings in this case on a piecemeal basis, and we decline again here to review the merits of the judgment in this ancillary proceeding. It is sufficient at this point to observe that the railroad's authorities regarding compensatory damages for non-economic losses are not controlling, and a multi-million dollar verdict in a wrongful death action has not been held by this court to be unconscionable *per se*.

Finally, the railroad argues that if a bond is required and it refuses to post the bond, its 50 miles of mainline track and critical unit-train coal traffic will be disrupted. This will result in extra cost to its customers, power blackouts in the Midwest, and the eventual crippling of America's industrial economy. BN Brief at 6; Robb Affidavit ¶¶ 3-4 (Exh. 4 to Motion for Stay). While some of those injuries may be irreparable, they are certainly and completely avoidable by the railroad simply posting the bond. As discussed above, this requirement cannot be held to be inequitable, when execution on the bond is conditioned upon exhaustion of Federal court review rights.

Appendix B

The issue of whether execution on the railroad's Reservation assets is pre-empted by federal law is not before us at this time. Expiration of the stay for failure to post bond would not necessarily result in execution against Reservation trackage (or necessarily limit execution on the judgment to those assets). Unless and until that series of eventualities must be dealt with in due course, this court will turn its attention to deciding the merits of the appeal. Toward that end, the court has settled questions on the composition of the record on appeal and established a briefing schedule in a separate order.

For the reasons stated above,

IT IS HEREBY ORDERED that:

1. Burlington Northern's conditional motion for stay of execution of the judgment without posting bond is DENIED;

2. This court's order in paragraph 2 of its Order Governing Conduct of Appeal dated February 6, 1997 (which stayed enforcement proceedings pending exhaustion of Burlington Northern's federal review rights) is VACATED;

3. Consistent with Crow R. Civ. P. 18(a), proceedings for enforcement of the judgment are STAYED until ten (10) days after entry of the Tribal Court's amended judgment on the limited remand; and

4. A further stay of proceedings to enforce the judgment shall be granted by the Tribal Court if appellant posts an acceptable surety bond with the Tribal Court in the aggregate amount of $30 million *before* the expiration of the stay ordered in paragraph 3 above, with the protective condition on the bond

that it will not be executed upon until Burlington Northern receives whatever Federal court review of the judgment to which it is entitled. Any deviation from the foregoing language as a condition on the bond shall be entertained by the Tribal Court only upon the stipulation of the parties.

DATED this 17th day of June, 1997.

s/ Victoria White
Victoria White, Chief Judge
Crow Court of Appeals

s/ Glen Birdinground
Glen Birdinground, Judge
Crow Court of Appeals

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals